

ORIGINAL

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FILE

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

In re Application of

UHURU COMMUNICATIONS, INC.

For Renewal of License  
of Station WUCI-FM  
Binghamton, New York

and

WSKG PUBLIC  
TELECOMMUNICATIONS COUNCIL

For a Construction Permit  
for a New FM Station  
Binghamton, New York

ARROWHEAD CHRISTIAN  
CENTER

For a Construction Permit  
for a New FM Station  
Binghamton, New York

TO: Administrative Law Judge  
Arthur I. Steinberg

MM DOCKET NO. 92-116

File No. BRED-9102307F

RECEIVED

JUL 13 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

File No. BPED-910501MB

File No. BPED-910501MC

**MOTION TO DELETE ISSUE**

WSKG Public Telecommunications Council ("WSKG"), by its attorneys and pursuant to Section 1.229(b) of the Commission's Rules, moves to delete the site availability issue designated against WSKG in the Hearing Designation Order in MM Docket 92-116, released June 6, 1992 ("HDO"). As shown below, the issue was designated through mistake and should properly be deleted.

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The HDO notes that WSKG proposes to operate "at the same site" as Uhuru Communications, Inc., the renewal applicant. The Mass Media Bureau apparently believes that WSKG's site selection represents an attempt by WSKG to trigger the Commission's old Cameron presumption,<sup>1/</sup> which has now been eliminated. Therefore, the Bureau concludes: "Since WSKG failed to provide reasonable assurance that Uhuru's site will be available to it, an appropriate issue will be specified." HDO at 1.

Here, the site availability issue against WSKG was erroneously designated. The Mass Media Bureau apparently relied on WSKG's specification of the same tower when designating the issue,<sup>2/</sup> but it overlooked facts in the WSKG application that demonstrate that WSKG did not in any respect rely on the Cameron policy.

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1/ The Cameron presumption is irrelevant to WSKG's application. The Cameron policy permitted a renewal overfiler simply to copy the exact facilities of the renewal applicant without independent engineering studies or confirmation of the renewal site's availability. See George E. Cameron Jr. Communications, 71 F.C.C.2d 460, 467 (1979). The policy presumed that the incumbent's transmitter site and equipment would be available to a challenger if it prevailed in the renewal hearing. Id.

In connection with the Commission's efforts to improve the comparative renewal process in 1989, it revoked the Cameron policy. This meant overfilers would have to independently engineer their technical proposals and establish reasonable assurance of site availability. First Report and Order in the Matter of Formulation of Rules and Policies... Relating to the Comparative Renewal Process, 4 FCC Rcd 4780, 4788-89 (1989). The Commission sought to prevent the cloning of renewal applicants' technical proposals and promote independent technical review so that applications by bogus renewal challengers would be minimized. Id.

2/ WSKG selected the tower because it already has broadcast facilities there and the site met its coverage objectives, not because it wanted to "clone" Uhuru's nonexistent technical facilities.

First, even a quick comparison of the applications show that WSKG independently engineered its proposal. Although WSKG used the tower authorized to Uhuru (the "WICZ-TV tower") and proposed coverage similar to WUCT's prior facility, WSKG did not duplicate Uhuru's technical facilities. The station class, effective radiated power and height above average terrain proposed for WSKG's facility are completely different from those specified in Uhuru's license.<sup>3/</sup>

Chart Comparing WSKG and Uhuru Technical Parameters

	<u>Station Class</u>	<u>ERP (watts)</u>	<u>CR-AGL (meters)</u>	<u>CR-HAAT (meters)</u>	<u>CR-AMSL (meters)</u>
WSKG	A	0.56	160	257	655
Uhuru	B1	0.658	172.21	241.4	637

Second, WSKG's application shows independently calculated radials to its 1 mV/m contour, specially prepared 7.5 minute topographical maps, aeronautical maps depicting the proposed WSKG station's service contours, tabulations of predicted service/interference contours for neighboring FM facilities and the requisite gain and loss calculations for WSKG's proposed transmission line and equipment. These showings are

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3/ Actually, Uhuru has no technical facilities that could have been specified by WSKG. As demonstrated in the un rebutted Petition to Deny filed by WSKG against Uhuru's license renewal, Uhuru has no antenna on the WICZ-TV tower, no FM transmitter at its licensed transmitter site and no contract with the tower owner for present or future space on the WICZ-TV tower. See attached letter from Gino Ricciardelli, Vice President, Engineering Stainless Broadcasting Company to Charles Mulvey, WSKG-TV, dated April 23, 1991. Thus, there is no "incumbent" to serve as the basis for any Cameron presumption reliance by WSKG.

inconsistent with any attempt to rely on the former Cameron presumption, which simply permitted a challenger to "take over" an incumbent's operations. In fact, WSKG has specified new facilities, though on the same tower.

Commission decisions illustrate that hearing issues will be deleted where the "Commission overlooked, misconstrued or failed to consider pertinent information relative to its determination to specify the issues for hearing." WOIC, Inc., 27 RR2d 408 (Rev. Bd. 1973). In Southern Broadcasting Co., 27 R.R.2d 845, 849 (1973), the Commission deleted a misrepresentation issue added by the Review Board where the "issue resulted solely from a misunderstanding of the true facts so that further exploration in the hearing process would serve no useful purpose." Similarly, in Salter Broadcasting Co., 8 F.C.C.2d 212, 213 (Rev. Bd. 1967), the Review Board deleted an air hazard issue and a financial qualifications issue that were inadvertently specified because not all the facts were considered. The Salter Review Board also deleted another issue based on a post-designation amendment because the unequivocal nature of the showing, the desirability of simplifying and expediting the proceeding and the open questions surrounding the Commission's requirements justified deletion of the issue. Id. at 213. More recently, Muncie Broadcasting Corp., 51 R.R.2d 46 (Rev. Bd. 1982), relying on Salter, deleted a financial issue designated as a result of the Bureau's misinterpretation of a document in an amendment before it. See also Portland Communications Corp., 46 R.R.2d 1257, 1258 (ALJ 1979) (financial issue deleted where

Commission overlooked amendment rendering issue immaterial); Centreville Broadcasting Co., 21 R.R.2d 217 (Rev. Bd. 1971) (financial issue deleted where Commission overlooked amendment and specified an issue due to factual error); Cleveland Broadcasting Inc., 1 R.R.2d 676 (Rev. Bd. 1963) (financial issue deleted where it was clear applicant's financial resources exceeded its needs despite error in application).

In this case, precedent compels deletion of the WSKG site issue. The Bureau erroneously assumed that WSKG relied on Cameron because WSKG specified the same tower as WUCT's licensed site. In fact, however, WSKG specified different, independently engineered facilities.

Finally, WSKG submits that additional facts, although not required to be included in its application, demonstrate that a site availability issue is inappropriate.<sup>4/</sup> The attached Declaration of Charles F. Mulvey shows that WSKG independently confirmed site availability with the tower owner before filing its application. Mr. Mulvey subsequently reconfirmed WSKG's site availability with the tower owner after learning that the site issue was designated.

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<sup>4/</sup> Parenthetically, WSKG notes that the application form for a noncommercial educational construction permit, FCC Form 340, does not require a site certification with the applicant.

Forcing WSKG to present evidence on this issue at hearing would be a waste of the Commission's resources.<sup>5/</sup> WSKG respectfully requests that the site availability issue specified against WSKG, Issue No. 2, be deleted.

Respectfully submitted,

**WSKG PUBLIC TELECOMMUNICATIONS  
COUNCIL**

By Todd D. Gray  
Richard D. Marks  
Todd D. Gray  
Margaret L. Miller

**DOW, LOHNES & ALBERTSON**  
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(202) 857-2500

Its Attorneys

July 13, 1992

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**5/ Should the Presiding Officer determine that this matter is more appropriately resolved by summary decision, WSKG requests that this motion be considered as a Motion for Summary Decision. There is no genuine issue of material fact for determination at hearing, so the standard for summary decision under Section 1.251 of the Commission's rules is met.**

# **DECLARATION OF CHARLES F. MULVEY**

**I, Charles F. Mulvey, hereby declare as follows:**

**1. I am an officer and employee of WSKG Public Telecommunications Council ("WSKG"). Until July 6, 1992, my position was Vice President for Engineering and my responsibilities included oversight of all engineering and physical plant matters for WSKG. Now my position is Vice President for Broadcast Technology and my responsibilities include new projects in the technical area, such as installation of new broadcast facilities.**

**2. WSKG currently leases tower space for its Binghamton broadcast facilities from Stainless Leasing Company of New York. The tower is also occupied by Station WICZ-TV, Channel 40, Binghamton, New York (the "WICZ-TV tower").**

**3. In order to co-locate with WSKG's other facilities, WSKG decided to use the WICZ-TV tower for its proposed new facility on 91.5 Mhz. I explained our coverage objectives to our consulting engineer, William J. Sitzman, Jr. Based on those objectives and on available raw engineering materials, Mr. Sitzman independently engineered the technical portions of our application. WSKG certainly did not attempt to specify the technical parameters previously licensed to Uhuru Communications, Inc. for Station WUCI(FM). While it appears that WUCI(FM) may have been licensed to use the WICZ-TV tower (at a different power and height), WUCI was not actually operating from the WICZ-TV tower at the time the WSKG application was submitted. A letter from Gino Ricciardelli, Vice President of Engineering**

for WICZ-TV addressed to me and dated April 23, 1992  
on the WICZ-TV tower PFE  
substantiates that WUCI had no facilities at that time. A copy  
of that letter is attached to this Declaration.

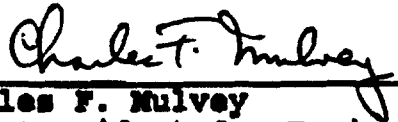
4. To the best of my knowledge and belief, Uhuru Communications, Inc. currently has no antenna on the WICZ-TV tower and no transmitter and/or shack on WICZ-TV property.

5. Before WSKG filed its application for a new FM facility on 91.5 Mhz, I telephoned Gino Ricciardelli of Stainless Leasing Company of New York to inquire whether the tower owners had space available for our proposed facility and whether WSKG could negotiate a contract if our FCC application was successful. In response, Mr. Ricciardelli sent me a letter, dated March 27, 1991, confirming the availability of space for our proposed FM antenna and acknowledging that a contract would be negotiated after the Commission issued a construction permit to us. A copy of that letter is attached.

6. After receiving a copy of the Hearing Designation Order in this comparative proceeding, I called Gino Ricciardelli to reconfirm that Stainless Leasing Company of New York would have space available on its tower for our proposed facility. Mr. Ricciardelli again confirmed, by letter, that our specified site was available. A copy of the second confirmation letter, dated July 7, 1992, is attached.



I declare under penalty of perjury that the foregoing  
is true and correct. Executed on July 9, 1992.

  
\_\_\_\_\_  
Charles F. Mulvey  
Vice President for Engineering



Stainless Broadcasting Company  
Vestal Parkway East, P.O. Box 1626, Binghamton, N.Y. 13902-1626 (607) 770-4040 FAX (607) 798-7950

April 23, 1991

Charles Mulvey  
Vice President of Engineering  
WSKG-TV  
531 Gates Road  
Vestal, NY 13850

Dear Charlie,

To best of my knowledge WUCI took their antenna off our tower and removed the transmitter and shack from our property in the spring of 1989.

They informed us that they were unable to pay back rent or could make payments in the future. They then made the decision to remove their equipment from our property.

Sincerely,

A handwritten signature in cursive script that reads 'Gino Ricciardelli'.

Gino Ricciardelli  
Vice President, Engineering

# *STAINLESS LEASING COMPANY*

## *OF NEW YORK, INC.*

NORTH WALES, PENNSYLVANIA, 19454

215-699-4871

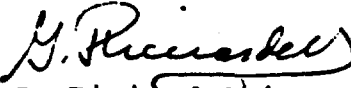
March 27, 1991

Charles Mulvey  
Vice President Engineering  
WSKG-TV  
531 Gates Road  
Vestal, NY 13850

Charlie,

This will confirm that space at the 525 ft. level  
is presently available for your F.M. antenna. When a  
C.P. is issued by the F.C.C. a contract will be negotiated.

Sincerely,

  
G. Ricciardelli  
Vice President  
Engineering

CC: H. J. Guzewicz



**WICZ-TV**

*A Division of Stainless Broadcasting Company*

July 7, 1992

Charles Mulvey

WSKG-FM

531 Gates Road

Vestal NY 13850

Charles:

This will confirm that space is available at the  
525ft. level above ground. Tower is located at

North Latitude      42° 03' 22"

West Longitude      75° 56' 39"

G. Ricciardelli

Vice President Engineering

**CERTIFICATE OF SERVICE**

I, Christine Harris, secretary in the law firm of Dow, Lohnes & Albertson, do hereby certify that the foregoing "MOTION TO DELETE" was mailed first-class, postage prepaid, this 13th day of July, 1992, to the following:

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- HAND DELIVERED